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FOR ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-911

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ROBBINS TIRE AND RUBBER COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF ON BEHALF OF RESPONDENT ROBBINS TIRE AND RUBBER COMPANY

WILLIAM M. EARNEST
ELARBEE, CLARK & PAUL
800 Peachtree-Cain Tower
Atlanta, Georgia 30303

CHARLES A. POELLNITZ
POELLNITZ, COX, ROBISON,
McBURNEY & JONES
Post Office Box 876
Florence, Alabama 35630

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OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals may be found in the Appendix ("A.") beginning at Page 108 and is reported at 563 F.2d 724 (1977). The Order of a separate panel of the Fifth Circuit denying Petitioner's emergency motion is found at A. 107. The Memorandum of Decision of the District Court (N.D. Ala.) is found at A. 57 and reported at 92 L.R.R.M. 2586 (1976).

STATUTES INVOLVED

Supplementing the statutory section of Petitioner's brief ("Pet. Br."), the Freedom of Information

Act (FOIA), as amended, 5 U.S.C. 552 also states at § (c):

> (c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

Prior to its amendment the FOIA of 1966 (P.L. 90-23, 81 Stat. 54) 5 U.S.C. 552 (Public Information; agency rules, opinions, orders, records and proceedings) stated:

> (b) This section does not apply to matters that are —
>
> (7) Investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
>
> * * *

QUESTION FOR REVIEW

In accordance with the 5 U.S.C. 552 (a) (4) (B) statutory provisions placing the burden of proof on the Board, providing for a *de novo* determination by the district court, and permitting an *in camera* examination by the court, may the Board withhold all the requested public information[1] under FOIA ex-

[1] Requested under 5 U.S.C. § 552(a) (3) were that "copies of all written statements, signed or unsigned, contained in the Board's case files with respect to those witnesses which the Board will call to testify at the hearing(s) in the above-referenced cases be made available for inspection and copying by the undersigned at least seven (7) days prior to the start of said hearing(s)." (A. 37).

emptions 5 U.S.C. 552(b)(5) and (7)(A) where at the district court hearing on the merits, the Board failed to offer any proof (affidavits, testimony, or otherwise) and did not even submit the requested information to the court for *in camera* examination.

COUNTERSTATEMENT OF THE CASE

This matter arose from the Board's categorical refusal to permit Respondent the right under 5 U.S.C. 552(a)(3) of the amended FOIA to inspect and, if necessary, copy information contained in Board investigatory case files.

A. BACKGROUND

The Board had conducted a secret ballot election among Respondent's bargaining unit employees concerning their representation by a union[2] (A. 11). The union lost the election and filed objections to the election in an effort to get another election. Pursuant to 29 C.F.R. 102.69, the Board's Regional Director conducted an investigation of the objections. During this investigation Respondent cooperated fully with the Board, permitting the Board's field examiner to interview its witnesses, review and copy documentary evidence, and to take sworn statements from Respondent's witnesses. As a result of the investigation five of the eleven objections were withdrawn, and one was overruled (A. 13, 20). The Regional Director concluded the remaining objections "raise credibility

[2] The union was the Aluminum Workers International Union, AFL-CIO.

issues which may best be resolved by record testimony at a hearing" (A. 22).

No unfair labor practice charges were filed by the union. However, on February 4, 1976, an individual, Gene E. Newton, filed an unfair labor practice charge[3] against Respondent alleging violation of Sections 8(a)(1) and (3) of the National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. 158(a)(1) and (3) (A. 26). During investigation of this charge, Respondent cooperated with the Board. The Regional Director concluded as a result of the investigation not to go forward with the Section 8(a)(3) portion of the charge regarding charging party Newton. Accordingly, the charge on March 3, 1976 was amended to only include the 8(a)(1) allegations (A.26). As the remaining 8(a)(1) allegations were largely duplicative of the objections which raised credibility issues the Regional Director issued a complaint and notice of hearing on March 26, 1976 (A. 28).

B. FOIA REQUEST TO BOARD

Inasmuch as the Board's investigation was then complete, Respondent immediately upon the March 31, 1976 receipt of the Board's complaint and notice of hearing, hand delivered to the Board's Regional Office an appropriate request for information under the amended FOIA (A. 37). By letter dated April 2, 1976, the Acting Regional Director of the Board's Tenth Region denied *in toto* Respondent's request, citing FOIA exemptions 5, 7(A), 7(C) and 7(D) (A. 39).

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[3] There is no evidence Respondent has ever been found guilty of committing any unfair labor practices.

Respondent promptly appealed to the Board's General Counsel noting the Acting Regional Director's general denial had not given specific consideration to the particular documents requested and had failed to show why portions of the requested documents were not segregable[4] and disclosable (A. 43). The Board's General Counsel by letter of April 15, 1976 denied Respondent's intra-agency appeal "substantially for the reasons set forth in the Regional Director's[5] letter of April 2, 1976." The General Counsel went on to state "Inasmuch as the purpose of the FOIA was not intended to be for discovery of our file contents, and noting the Board's Rules do not provide for discovery of any of the information you seek, the request must be denied." (Petition for Certiorari, App. E, p. 37A). The General Counsel continued "Finally, with respect to this Agency's refusal to 'sanitize' the requested information, it is our belief that such an undertaking would be impractical since it is impossible to determine exactly what part of the information would need to be deleted in order to protect our enforcement proceedings, any privacy privileges or our confidential sources." (*Id.*, p. 38A).

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[4] The 1974 amendments to the FOIA added the requirement qualifying the exceptions:

> "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." (5 U.S.C. 552 (b)).

This was omitted from the Pet. Br. p. 4.

[5] Even though Respondent's request was limited in time and scope of disclosure it was accorded only a rubber stamp handling as is shown by the "canned" referral to the "Regional Director's letter" when here the *Acting* Regional Director responded (A. 39).

C. DISTRICT COURT'S DE NOVO DETERMINATION

After telephoning the General Counsel's office on April 9 and 12, 1976, concerning the possibility of Respondent having to file a suit in District Court to obtain the requested information and being informed on April 12, 1976 by General Counsel's office such request would not be granted (A. 48, 49), Respondent filed on April 15, 1976 its action under the amended FOIA seeking the requested information (A. 1, 3-49). Petitioner then filed a written motion to dismiss the action or in the alternative for summary judgment (A. 50). In support of its position, the Board filed an opposition brief (A. 49-58). This brief and the Board's oral argument[6] focused almost exclusively on the 7(A) exemption and whether the Court could enjoin the Board under the amended FOIA.

During the District Court hearing on the merits the Court asked the Board's counsel if the Board had "anything by way of evidence that they desire to offer?" (A. 71). The counsel for the General Counsel responded "No, Your Honor" (A. 71). Later in the hearing the Court reminded the Board's counsel the burden of establishing an exemption rested upon the NLRB. The Court then inquired if there was anything unique about the statements or unusual that would cause them to interfere with the enforcement proceeding or whether the Board's position was that as

[6] During the course of the hearing the counsel for the General Counsel furnished the Court with a copy of the Second Circuit's *Title Guarantee* decision (534 F.2d 484, *certiorari denied*, 429 U.S. 834) and suggested *Title Guarantee* was "dispositive of the issue" (A. 77).

a general proposition the giving of virtually any statement would interfere. Counsel for the General Counsel said he would have to accept the latter description as there was nothing unique in Board proceedings in these statements. The Court then asked the Board's counsel if he was then taking the position he didn't need to go forward and make a showing that these particular statements would interfere, that these were just normal statements and that these like any other statements would interfere. Counsel for the General Counsel replied, "Yes, Your Honor, Yes" (A. 91).

The Board offered no evidence of any sort — no affidavits, no oral testimony, no documents, no evidence whatsoever. Neither did the Board at any time submit the requested information to the Court for an *in camera* examination, nor did it describe the information as having a deliberative quality. The Court then took the matter under advisement (A. 59).

On April 16, 1976, the Court issued its Order and Memorandum of Decision (A. 57-65 and which is reported at 92 LRRM 2586) finding[7] the Board had "not demonstrated how the delivery to (Respondent) several days prior to the scheduled hearing of routine statements or affidavits will interfere with enforcement proceedings of the Board where in connection with those proceedings, the Board by its own rules will be required to give the statements and affidavits to (Respondent)" (A. 64). The Board was then ordered to disclose the requested information (A. 65).

[7] The Court also noted ". . . the *fact* of disclosure of the statements is not the issue but simply the *time* at which the disclosure will be made" (A. 64; emphasis original).

D. THE BOARD'S APPEALS

On April 20, 1976 the Board filed with the Fifth Circuit an emergency motion for stay pending appeal (A. 96). Cited therein was *Beverly v. U. S.*, 468 F.2d 732 (C.A. 5, 1972)[8] which listed as one of four factors, "the likelihood of his prevailing on the merits on appeal." (*Beverly*, pp. 740, 741) Respondent on April 22, 1976 filed its response to the Board's motion (A. 99). On April 26, 1976, the Fifth Circuit[9] denied the Board's motion.

Subsequently the Fifth Circuit heard oral arguments from both the Board and Respondent and issued its opinion on November 21, 1977 (A. 108 and which is reported at 563 F.2d 724), affirming the District Court. In its decision the Fifth Circuit reviewed the facts of this particular case in light of the legislative history of the FOIA and its amendments. The Fifth Circuit also looked to this Court's opinions in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Department of the Air Force v. Rose*, 425 U.S. 352 (1976); *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974); *EPA v. Mink*, 410 U.S. 73 (1973); *Hickman v. Taylor*, 329 U.S. 495 (1947), as well as to the varied decisions of the other circuits and to leading law reviews and treatises in this area. The Fifth Circuit concluded the Board had failed to sustain its statutory burden of proof as to exemptions 7(A),

[8] The Board noted this Court cited *Beverly* with approval in *In re Permian Basis Area Rate Cases*, 390 U.S. 747 (1968).

[9] The Fifth Circuit panel which denied the Board's motion was completely different from the panel deciding the case in chief. Both panels ruled unanimously against the Board's position.

7(C), 7(D) and 5. Accordingly, it affirmed the District Court's order compelling disclosure (A. 129).

SUMMARY OF ARGUMENT

I

An agency's internal and restrictive regulations do *not* supersede federal statutes requiring liberal disclosure of requested information in agency hands. Congress left no doubt in passing the 1974 amendments to FOIA there was to be more complete disclosure of information in investigatory files. Any and all investigative information is *prima facie* disclosable unless the withholding agency sustains its burden of proof in the *de novo* district court hearing such requested information relating to a particular enforcement proceeding is exempt. In the case *sub judice* no evidence of any sort was presented to the District Court nor were the particular statements requested offered for *in camera* examination by the Court. The Board categorically, without any proof, withheld the requested information.

A. The legislative history of the 1974 FOIA amendments is replete with evidence of Congress' intent to eliminate bureaucratic delays and categorical excuses for withholding information from the public. Gone are the blanket exemptions of the 1966 FOIA. No longer will agency rubber stamps and investigatory file categories shield investigative information. The agency must even disclose segregable portions of requested information. The *particular* documents requested are to be considered. Disclosure determinations based on *types*

of documents (e.g. "typical Board statements") are contrary to the amended FOIA with its burden of proof, *de novo* hearing, and *in camera* examination provisions.

B. Section (a) (4) (B) of the amended FOIA unequivocally places the burden of proof on the withholding agency. In overriding a Presidential veto and in spite of Congressional efforts to the contrary, Congress dictated there would be *no* presumption in favor of an agency determination to withhold, but that the agency must prove by testimony or affidavits in a *de novo* district court hearing the *particular* requested information may be withheld. In establishing these agency requirements Congress was keenly aware of the Board's present argument that sustaining the burden of proof of interference might be difficult.

C. With regard to "the particular enforcement proceeding" as Senator Hart stated regarding his exemption 7 amendment in 1974, the Board has offered no evidence whatsoever. Nor does the Board have any statutory presumptions regarding whether disclosure of requested information "*would* interfere." Such determination can only be made on the basis of evidence and not on the basis of internal agency assumptions which have proven not to be valid. Disclosure of the particular documents as requested in this case would not interfere with the Board enforcement proceedings.

The requested information would even be disclosed a few days later under the Board's own

rules. Knowledge of information in investigative witness statements has not interfered with Board proceedings as shown by the low priority the Board gives to 8(a) (4) cases, by the fact 8(a) (4) cases constituted only 3.1% of unfair labor practice charges against employers, and by the Board's recent Memorandum (Resp. App. B) admitting its disclosure rules were too restrictive in certain proceedings. Empirical studies, resisted by the Board, further expose the hollow facade of the Board's "interference" contention.

The Fourth Circuit in *Hospital Authority v. Perry*, ... F.2d ...., 16 FEP 68 (January 26, 1978), a case involving requested investigative affidavits from the E.E.O.C., has now joined the Fifth Circuit in rejecting *Title Guarantee's per se* approach in favor of a factual determination by the district court on a case-by-case basis. The *Title Guarantee* decision confused the Board's internal discovery limitations with the amended FOIA's separate disclosure requirements.

II.

Before the District Court the Board did not argue the requested statements were "memorandums" or "letters" within the meaning of exemption 5. Neither did the Board assert the statements were deliberative as opposed to factual documents. Moreover no evidence whatsoever was offered to sustain the Board's burden of proof in withholding requested information under exemption 5. The Tenth Circuit in *Poss v. N.L.R.B.*, 565 F.2d 654 (1977), found exemption 5 "clearly

inapplicable" to a request concerning investigative witness statements.

A. This Court in *Sears*, 421 U.S. 132 (1975), and *Mink*, 410 U.S. 73 (1973), recognized Congressional intent in enacting exemption 5 was to apply a factual versus deliberative approach to protect the governmental decision making process. Purely factual, investigative material may not be withheld under exemption 5.

B. The Board has inconsistently claimed exemption 5 and the included "work-product" aspect of exemption 5 as a defense to disclosure of witness statements. Even where the exemption 5 work-product claim has been made it has not been accepted by the Courts. Moreover the Board's internal guidelines for use of the exemption 5 argument have *not* recommended exemption 5 be used to defend against disclosure of witness statements. The "work-product" aspect of exemption 5 is protected by a consistent factual/deliberative interpretation which would exempt "the mental impressions, conclusions, opinions or legal theories of the attorney." The requested statements do not have this deliberative aspect and must be disclosed.

ARGUMENT

I. WHERE, UNDER THE AMENDED EXEMPTION 7(A) OF THE FOIA THE BOARD HAS NOT PROVED PRODUCTION OF THE REQUESTED INFORMATION WOULD INTERFERE WITH ENFORCEMENT PROCEEDINGS, THE BOARD MUST MAKE AVAILABLE THE REQUESTED INFORMATION.

An agency's internal regulations and unsubstantiated inferences clearly do not supersede federal statutes. Yet in the case *sub judice* this is precisely what the NLRB seeks to accomplish. It is uncontroverted by the Board that through its own, internally generated Rules and Regulations, it has historically denied access to information contained in the Board's investigative files (Resp. App. A). Congress in the 1974 FOIA amendments (Public Law 93-502, 93rd Congress, H.R. 12471 — November 21, 1974) opened agency investigatory files to the public. Records in these investigatory files were to be promptly made available to the public upon proper request. If the agency refused, as here, the agency in a *de novo* district court hearing had the burden of proving the withheld records were specifically exempted (5 U.S.C. 552(a)(4)(B). The Board here did not produce *any* evidence to meet its burden of proof. Neither were the requested records offered for *in camera* inspection by the Court. Instead the Board took a *per se* approach to non-disclosure of the requested information. This of course is contrary to the amended FOIA.

A. THERE ARE NO INVESTIGATORY RECORDS WHICH HAVE A PER SE EXEMPTION UNDER THE AMENDED FOIA.

"You may lead me to the trough but you can't make me drink" has been and is in many instances the attitude of government agencies when faced with directives from the legislative and judicial branches of our Government. Representative Alexander (Arkansas) in the House vote (October 7, 1974) approving the Conference Report, stated in support of the 1974 FOIA amendments:

> Since the enactment of the first housekeeping statutes under George Washington for the purpose of allowing department heads to adopt regulations governing the custody, use and preservation of Official Government documents, the executive branch has become more and more effective in twisting these laws into an excuse for hiding information and documents from the American people.
>
> Why do we have this secrecy in Government? In many instances, it appears that it is simpler for our Government officials to have a "secret" stamp on hand than to go to the trouble of digging up the information to answer a lot of questions. This same "secret" stamp makes it easier to hide errors of judgment and the favors of politics which could be damaging to the men in control.
>
> Things have not improved much over the years, I am afraid, even though the passage of the 1967 Freedom of Information Act was a giant

> step in returning to the public access to their own public documents.
>
> (Source Book, p. 386)[10]

Representative Alexander related some of his personal experiences fighting for information guarded by agency regulation. He described one request to the Department of Justice for investigative information:

> In each case, I was told that the information I requested was either not available or that it could not be made available to me. I was told that the FBI could not release the details of the investigation and that we must rely on the FBI's judgment that there had not been any illegal activities connected with the sale.
>
> The investigations were secret, but it was no secret that bread prices were higher and the American people were not ready to accept such a decision from the FBI *without having access to the facts* that would back up such a judgment.
>
> As long as a man is informed, he can usually take action to insure that his other rights are not violated. If I, as a Member of Congress and the Government Operations Committee, who works daily with the bureaucracy, become frustrated when I am denied access to information vital to the public welfare, what about John Q. Citizen and his efforts to get the information he needs?

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[10] Source Book: Freedom of Information Act and Amendments of 1974, Legislative History, Texts, and Other Documents, Joint Committee Print, 94th Cong., 1st Sess. (G.P.O. 1975).

* * *

The enactment of these amendments to the Freedom of Information Act will put an end to the ridiculous delays, excuses, and bureaucratic runarounds which have denied U. S. citizens their "right to know" and made Americans a captive of their own Government.

(Source Book, pp. 387, 388: emphasis added)

Senator Kennedy (Massachusetts), the leading proponent of the 1974 FOIA amendments, urged adoption during the Senate's May 30, 1974 consideration of the FOIA amendments. Senator Kennedy stated:

The Supreme Court of the United States observed a few years ago that:

"It is now well established that the Constitution protects the right to receive information and ideas."

Continued the Court,

"This right to receive information and ideas is fundamental for our free society."

An important objective behind the Freedom of Information Act, passed by Congress in 1966, is to give concrete meaning to one aspect of this right to receive information — the right to receive information from the Federal Government. This is no meager right. The processes of Government touch almost every aspect of our lives, every day. From the food we eat to the cars we drive to the air we breathe; Federal agencies constantly

monitor and regulate and control. Our Government is the biggest buyer and the biggest spender in the world. It taxes and subsidizes and enforces. And it generates tons of paperwork as it goes about its business.

The Freedom of Information Act guarantees citizen access to Government information and provides the key for unlocking the doors to a vast storeroom of information. The protections of the Act thus become protections for the public's right to receive information and ideas. And the accomplishments of the act become fuller implementation of the first amendment of the Constitution.

There is another significant purpose behind the Freedom of Information Act, perhaps best stated by Justice Brandeis when he wrote:

"Publicity is justly commendable as a remedy for social and industrial disease. Sunlight is said to be the best disinfectant, and electric light the most effective policeman."

Chief Justice Warren echoed this recently when he said that secrecy "is the incubator for corruption." We have seen too much secrecy in the past few years, and the American people are tired of it

* * *

Finally, the Freedom of Information Act is basic to the maintenance of our democratic form of government. President Johnson said on signing the FOIA that —

> "A democracy works best when the people have all the information that the security of the nation permits."
>
> The people can judge public officials better by knowing what they are doing, rather than only by listening to what they say.
>
> (Source Book, pp. 284, 285)

— and what the Board here is saying, is inconsistent with Congressional intent which was so strong it overrode a Presidential veto.[11] Congress was determined that an agency's self-designated categories, conclusions and presumptions not be used to withhold requested information. No longer would rubber stamp refusals of records marked "SECRET," "CONFIDENTIAL," or "INVESTIGATORY FILE" shield information from disclosure. Congress amended out the agency's categorical denial of files and required review of each requested record, even to the point of requiring disclosure of just portions of records.[12]

On November 2, 1977, Representative Brooks (Texas), Chairman of the Governmental Information and Individual Rights Subcommittee, submitted its

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[11] The House voted 371 to 31 and the Senate voted 65 to 27 to override the veto (Source Book, pp. 431, 480).

[12] Added to the amended exemptions was the requirement that

> "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

report[13] based on its study of the FOIA and Privacy Acts. The Report at page 13 stated regarding exemption 7:

> Exemption (b)(7): Investigatory files
>
> * * *
>
> The original provision concerning investigatory files was interpreted by the courts to include almost any file which could be labeled "investigatory" in nature. However, the 1974 amendments to the act narrowed the exemption by providing that investigatory records could be withheld only if their release would result in one or more of six specific harms (listed above). The amendments also changed the language of the provision to cover investigatory "records" rather than investigatory "files." The fact that a particular record is an investigatory file does not mean that it is automatically exempt. Each document or part of each document in the file must now be examined to determine whether its disclosure would result in one or more of the six enumerated harms. Moreover, these portions that do not fall within any of these categories must be released.

This new approach of examining a particular requested document in an investigatory file is firmly supported by the legislative history of the 1974 FOIA

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[13] A Citizen's Guide on How to Use the Freedom of Information Act and the Privacy Act in Requesting Government Documents; Report 95-793 (Nov. 2, 1977), 95th Cong., 1st Sess. (G.P.O. 1977). This Report (pages 5 and 6 therein) contains a review of the Legislative Background of the FOIA from 1958 to the present. (Resp. App. C)

amendments. Senator Kennedy, during the Senate's May 30, 1974 consideration of the FOIA amendments, stated:

> Now I would like to turn to another important feature of S. 2543, which is reflected in two provisions of the bill. That is the strong statement against commingling of exempt with nonexempt materials in order to prevent disclosure of the latter, and against withholding records where deletions would as well serve the purposes of the exemption under which they are withheld. Section 552(a)(4)(B)(i) provides that the court shall in Freedom of Information Act actions "consider the case de novo, with such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action."

Furthermore, a new sentence is added to section 552(b) stating:

> "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this section."

Taken together these provisions are intended to require agencies, and courts, to look at the information requested — not the title of the document or restricted-access stamp or the fact that the record is in a file marked "Confidential" or

"Investigation" — to determine whether the information should be released under the Freedom of Information Act.

When I originally introduced S. 2543 in October 1973, the new sentence added to section 552(b) would have read as follows:

> "If the deletions of names or other identifying characteristics of individuals would prevent an inhibition of informers, agents, or other sources of investigatory or intelligence information, then records otherwise exempt under clauses (1) and (7) of this subsection, unless exempt for some other reason under this subsection, shall be made available with such deletions."

During subcommittee consideration of the legislation it became clear that it would be desirable to apply this deletion principle to other exemptions. For example, deletion of names and identifying characteristics of individuals would in some cases serve the underlying purpose of exemption 6, which exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Deletion of formulas or statistics or figures may also in many cases entirely fulfill the purpose of the fourth exemption, designed to protect "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Thus the objectives and purposes of these exemptions, as well as of exemptions (1) and (7), could equally be served by

selective deletions while the basic document or record or file could otherwise be made available to the public.

It is upon this background that the new language in the Freedom of Information Act must be read. The Association of the Bar of the City of New York, in its recent report on freedom of information legislation, indicated its conclusion that the deletion or "savings clause" is "in its original form one of the most significant proposed amendments of the FOIA. It seems very important," stated the association, "that this deletion concept be expanded to cover other reasons for nondisclosure and all exemptions." This is precisely what we had in mind, Mr. President, in amending the original language. As stated in the committee report, page 32:

> "The amended language is intended to encompass the scope of this original proposal but to apply the deletion principle to all exemptions."

With the new provisions it should be clear that there can be no blanket claim of confidentiality under any of the exemptions. In connection with this objective, S. 2543 proposes specifically to reaffirm the discretion of the courts through in camera inspection to examine each and every element of requested files or records. The Senate report in this respect cites with approval the type of procedure set out in the District of Columbia Court of Appeals in the case of Vaughn against Rosen, requiring the Government to sustain its

burden of justifying its withholding of each element of a contested file or record. That procedure is consistent with our intent that only parts of records which are specifically exempt may be withheld from public disclosure. This should result in maximum possible disclosure and is consistent with the original congressional purpose in enacting the Freedom of Information Act.

This new requirement is also consistent with most judicial pronouncements in Freedom of Information Act cases, although unfortunately some courts are not adhering to the principle under some exemptions. The new language in S. 2543 should extend this deletion principle to all cases, involving all exemptions. As one court observed, "It is a violation of the act to withhold documents on the ground that parts are exempt and parts nonexempt." "Suitable deletion may be made," said the court. In another case the court found that the legislative history of the Freedom of Information Act "does not indicate . . . that Congress intended to exempt an entire document merely because it contained some confidential information." And another court said that "identifying details or secret matters can be deleted from a document to render it subject to disclosure."

(Source Book, pp. 292, 293)

Senator Hart, having just offered Amendment No. 1361 concerning exemption 7, also stated:[14]

[14] See also Senator Hart's remarks in the November 21, 1974 Senate hearing overriding the veto wherein Senator Hart strongly opposed the agency categorical approach to withholding documents (Source Book, p. 451).

> Recently, the courts have interpreted the seventh exception to the Freedom of Information Act to be applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes — a stone wall at that point. The court would have the exemption applied without the need of the agency to show why the disclosure of the *particular* document should not be made.
>
> (Source Book, p. 332: emphasis added)

Senator Hruska (Nebraska) opposed the successful exemption 7 amendment with a written statement which in applicable part stated:

> Here are some of the effects which adoption of the Hart amendment could have.
>
> • • •
>
> 2. It could impose upon these agencies the tremendous task of reviewing each page of each document contained in any of their many investigatory files to make an independent judgment as to whether or not any part thereof should be released.
>
> (Source Book, p. 364)

Yet the Board, at the District Court hearing on the merits and even to the present, has refused to consider the particular statements which were requested — holding out to the Court there was "nothing unique" in the statements, "just normal statements" (A. 91). Clearly the amended FOIA applies equally to

the NLRB as to other government agencies. Congress enacted no special immunity for the NLRB or for any of its investigatory records.

The Board's continuing pre-amendment approach is shown by its General Counsel's April 15, 1975 letter of denial which stated in applicable part:

> • • •
>
> Inasmuch as the purpose of the FOIA was not intended to be for discovery of our *file* contents, and noting that the *Board's Rules* do not provide for discovery of any of the information you seek, the request must be denied. See Interboro Contractors, Inc. v. N.L.R.B., 432 F.2d 854, 857-860 (C.A. 2, 1970), cert. den., 402 U.S. 915, and Electromec Design & Development Co. v. N.L.R.B., 409 F.2d 631 (C.A. 9, 1969). (Pet. for Cert., App. E, p. 37A: emphasis added)
>
> • • •

To the contrary, the FOIA amendments did open up agency "files" and the Board's own internal restrictive disclosure rules are inapplicable to a valid FOIA request. The Board fails to realize the amended FOIA is not a section of the NLRA but a separate statute with which it must comply.

The Board has taken an intransigent and categorical position that all of its investigatory statements are nondisclosable *per se*. Such is undoubtedly contrary to the clear language of the amended FOIA and the supporting legislative history.

B. THE BOARD HAS OFFERED NO PROOF THAT DISCLOSURE OF THE REQUESTED INFORMATION WOULD INTERFERE WITH ENFORCEMENT PROCEEDINGS.

The statutory language of the amended FOIA (specifically 5 U.S.C. 552 (a)(4)(B)) squarely and clearly places the burden of proof in a *de novo* district court hearing on the government agency withholding requested information. As stated on page 15 of the November 2, 1977, Report of the Government Information and Individual Rights Subcommittee, 95th Congress, 1st session, *supra:*

> TAKING YOUR CASE TO COURT
>
> * * *
>
> As a plaintiff under the FOIA, you go into court with the presumption that right is on your side: the burden of proof is on the Government to justify withholding information. Whenever there is a doubt as to which side is right the courts are supposed to rule in favor of disclosure. Moreover, pursuant to the 1974 amendments to the act, judges are authorized to examine the contents of contested documents to determine whether all or any part of them can be withheld. The law requires that "reasonably segregable portions" of the exempt records be released: this means non-exempt portions that are intelligible.
>
> * * *

The legislative history of the 1974 FOIA amendments further establishes there is *no* presumption in favor of the agency's determination. Senator Muskie (Maine) who was opposed to any agency presumptions in the

de novo hearing stated in the May 30, 1974 debate on the FOIA amendments:

> I do not see why the head of a department should be able to walk into a judge's chamber, knowing that his testimony is against that of any other expert and weighs more than any other on a one-for-one basis. He has the additional weight that the exclusive judgment is given to him. He has all of that behind him.
>
> Why should he be given a statutory presumption in addition if he cannot make his case on its merits. He is in a better position to do that than anyone else.
>
> Then, if he cannot make a case on its merits, I say he is not entitled to a presumption.
>
> We ought not to classify information by presumptions, but only on the basis of merit. And only the head of an agency involved can make that case. And if he cannot make it, then he ought to lose it and not find it possible to get sustained only through the support of a statutory presumption.
>
> (Source Book, pp. 308, 309)

The opposition to Senator Muskie's position argued the court should sustain the agency if the court finds the Agency's determination was "reasonable." However, Senator Muskie's amendment was passed 56 to 29 by the Senate (Source Book, p. 328).

In supporting the Muskie amendment, Senator Ervin (North Carolina) stated:

Mr. Ervin. Mr. President, I rise in support of this amendment. It seems to me that we ought not to have artificial weight given to agency action, which the bill in its present form certainly would do.

It has always seemed to me that all judicial questions should be determined de novo by a court when the court is reviewing agency action. One of the things which has been most astounding to me during the time I have served in the Senate is the reluctance of the executive departments and agencies to let the American people know how their Government is operating. I think the American people are entitled to know how those who are entrusted with great governmental power conduct themselves.

* * *

I strongly support the amendment offered by the distinguished Senator from Maine, of which I have the privilege of being a cosponsor, because it makes certain that when one is seeking public information, or information which ought to be made public, the matter will be heard by a judge free from any presumptions and free from any artificial barriers which are designed to prevent the withholding of the evidence; and I sincerely hope the Senate will adopt this amendment.

(Source Book, pp. 321, 322)

Thus the Board's historical "presumption" that disclosure of the requested statements would "interfere" is not entitled to any statutory "head-start." The

court's determination is to be made on the basis of demonstrable, judicial facts. The Board of course argues it has difficulty proving its case. This of course is always true when a party makes inferences not supported by facts. Congress was mindful of the Board argument when it passed the 1974 FOIA amendments over the presidential veto. In the November 21, 1974 Senate consideration which overrode the veto, Senator Thurmond (South Carolina) stated:

> Under this bill, Mr. President, these investigatory files would be exempt from disclosure only if the Government could prove that the release would cause harm to certain public or private interests. The President objected to this portion of H.R. 12471, since it would be almost impossible for the Government to establish in every instance that harm would result from a release of information.
>
> Instead, the President suggested that investigatory records of the Federal Bureau of Investigation and other law enforcement agencies should be exempt from the act if there is a "substantial possibility" of harm to any public or private interest.
>
> (Source Book, p. 466)

Senator Scott (Pennsylvania) in the November 21, 1974 Senate discussion concerning the President's veto stated:

> "I agree with him that it would be very difficult for the Government to prove to a court that disclosure of detailed law enforcement investigatory

files would be harmful. And I agree with him that "additional latitude" must be provided Government agencies during the information release period.

However, in spite of my sympathy with the purpose of the veto, I am convinced that I must vote to override.

(Source Book, p. 474)

Senator Hruska also stated during this debate, urging sustaining the veto:

Mr. President, every practitioner in administrative law knows that judicial review of agency decisions is not unlimited. The courts review agency decisions to determine whether they are reasonably based or whether they are arbitrary or capricious. This enrolled bill would establish a different type of review, however. It would empower a court to substitute its own decision for that of the agency. This is not review of agency decisions but the making of the decision itself.

* * *

The confidentiality of countless law enforcement files containing information of the highest order of privacy is jeopardized by this bill. At stake here is not simply the issue of effective law enforcement but the individual's right to privacy assurance of personal security, and to be secure in the knowledge that information he furnishes to a law enforcement agency will not be disclosed to anyone who requests it.

The enrolled bill requires the FBI and other law enforcement agencies to respond to any person's request for investigative information by sifting through pages and pages of files within strict limits. If the agency believes that information must be withheld from the public, it must prove to a court line-by-line that disclosure would disclose the identity of a source or confidential information furnished by him, would impair the investigation or would constitute an invasion of personal privacy.

Mr. President, it is extremely difficult if not impossible to prove that information, if disclosed, would invade a person's privacy or would impair the investigation. The magnitude of such a task and the standards of harm that are defined in the amendment create serious doubt as to whether such a provision is workable aside from its questionable wisdom. Where the rights of privacy and personal security are at stake, measures should not be adopted that even tend indirectly to undermine these fundamental rights.

(Source Book, pp. 456, 457)

Also in the House, Representative Aspin (Wisconsin) in the House's November 20, 1974 debate on the veto stated:

No, by their own actions the managers of those classification stamps have forfeited any presumption that their actions are reasonable. Let the courts decide.

The second objection raised in the veto message is simply a matter of administrative convenience. It is claimed that too great a burden is placed on the bureaucracy to act quickly and to demonstrate document by document that there is a need for secrecy. If the agencies had a history of cooperation with the spirit of freedom of information, if we did not have before us their history of stubborn, protracted, trench warfare, yielding nothing except under compulsion, then these arguments might carry some weight. But the record being the record, I cannot work up any great degree of sympathy for the administration's position. The President would have us build in loopholes for the agencies to snipe through. I see no reason to do so.

This bill, as we passed it before, is a major advance. I hope my colleagues support overriding the President's veto.

(Source Book, p. 421)

In his October 17, 1974 message to the House, President Ford stated his reasons for his veto of the FOIA amendments:

> Second, I believe that confidentiality would not be maintained if many millions of pages of FBI and other investigatory law enforcement files would be subject to compulsory disclosure at the behest of any person unless the Government could prove to a court — separately for each paragraph of each document—that disclosure "would" cause a type of harm specified in the amendment. Our law enforcement agencies do not have, and

> could not obtain, the large number of trained and knowledgeable personnel that would be needed to make such a line-by-line examination of information requests that sometimes involve hundreds of thousands of documents, within the time constraints added to current law by this bill.
>
> (Source Book, p. 484)

The President's veto was subsequently overridden by Congress. Thus any withholding agency, without the benefit of a presumption in favor of its internal determination, has the burden of proving in a *de novo* court hearing that a particular exemption is applicable. The agency's proof must relate to the particular records requested and must disclose those records or parts thereof which it cannot prove to be exempt.

Before the District Court in the case *sub judice* the Board offered *no proof of any sort* (A. 71, 91). They only relied on the argument (not proof) the requested statements were exempted simply because they were Board statements.[15] Such approach does not satisfy the Board's statutory burden of proof. It is nothing more than the Board trying to lift itself by its own bootstraps. Congress had in mind proof of facts and not presumptions. The House Conference Report states "the Government should be given the opportunity to establish by means of *testimony or detailed affidavits* that the documents are clearly exempt

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[15] It is interesting to note that even in the Board's own Rules and Regulations regarding withholding of information (29 C.F.R. 102.118(a)) the Board does not list the investigative "statement" as a document to be specifically withheld even though the term statement is subsequently used in the same section and even defined therein (Resp. App. A).

from disclosure. The burden remains on the Government under this law" (Source Book, p. 114; emphasis added.

That the court should make its decision on the weight of "evidence" was also shown in a joint letter from Senators Mathias (Maryland), Case (New Jersey), Javits (New York), Baker (Tennessee), Kennedy (Massachusetts), Muskie (Maine), Hart (Michigan) and Ervin (North Carolina) to their colleagues urging overriding the FOIA amendments veto. The October 31, 1974 letter read in part:

> Dear Colleague: We are enlisting your support to override President Ford's veto of the Freedom of Information Act Amendments (H.R. 12471) when the Congress returns from the current recess. We believe that this veto is unjustified and urge that the legislation be enacted as previously approved by Congress.
>
> The 1966 Freedom of Information Act has worked neither efficiently nor effectively. There are loopholes in the statute. Agencies have engaged in delaying and obstructionist tactics in responding to requests for government information. The Freedom of Information Act Amendments will facilitate public access to information, while preserving confidentiality where appropriate.
>
> The President has proposed numerous specific changes to this legislation. Similar proposals were made by government agencies time and again over the past year and a half. These proposals were considered, they were debated, and in the end they were rejected during the legislative process.
>
> * * *
>
> We believe that the approach taken in the Amendments is the correct one. Federal courts should have the authority to review agency classification of documents and make their findings on the weight of the evidence.
>
> * * *
>
> The President has also decried the possibility of an administrative burden placed on law enforcement and other agencies by the new amendments, although we are pleased to note that he did not object to the opening of some new investigatory materials to the public. We believe, however, that the additional delays, charges, and exclusions requested by the President do more than alleviate administrative burden—they would effectively bar access to some records by the press, the nonaffluent, and the scholar.
>
> Freedom of Information is too precious a right to be sacrificed to false economy. Like due process, it may carry some cost; but that is a cost to be borne by all Americans who would keep our government open and accountable and responsible.
>
> Government agencies universally opposed original enactment of the Freedom of Information Act in 1966, and they likewise opposed enactment of amendments to the Act this year.

• • •

(Source Book, pp. 462, 463)

This Court, in *Department of the Air Force v. Rose*, 425 U.S. 352, 358 (1976), affirmed the Second Circuit's decision finding the agency had not carried its burden in the District Court, imposed by the Act, of "sustain[ing] its action by means of affidavits of testimony . . . " See also the District of Columbia Circuit's decision in *Vaughn v. Rosen*, 523 F.2d 1136 (1975) where the agency's burden of proof was not even satisfied with "conclusory" affidavits (*Id.*, pp. 1145-1147).

C. THERE IS NO PRESUMPTION UNDER THE 1974 FOIA AMENDMENTS DISCLOSURE WOULD INTERFERE WITH ENFORCEMENT PROCEEDINGS.

As discussed in subsection B *supra*, the FOIA amendments require proof not bootstrap presumptions. The Board has not met its burden of proof in the instant case. Instead the Board relies on Senator Hart's reading of the 1966 FOIA regarding exemption 7 (Pet. Br. pp. 27-29) and upon Senator Humphrey's remark that Board witnesses enjoyed no protection prior to testifying (Pet. Br., p. 24, fn. 11).[16] What the Board fails to come to grips with is that the 1974 FOIA amendments to exemption 7 were not a mere continuation of the Board's *per se*, non-disclosable

[16] Senator Humphrey apparently was mistaken as the Board protects under 29 U.S.C. 158(a)(4) those filing charges, giving statements, or otherwise utilizing the Board's processes, even if such person(s) never testify.

approach. Senator Hart when proposing the amendments to exemption 7 said:

> "In determining whether or not the information to be released will *interfere* with a law enforcement proceeding it is *only* relevant to make such determination in the context of the *particular* enforcement proceeding."
>
> (Source Book, p. 333: emphasis added)

Yet the Board refuses to consider the particularities in the case at hand (A. 91). This is exactly the "wooden and mechanical" approach which caused Congress to amend the 1966 FOIA. Interference with an enforcement proceeding was only relevant in the context of that particular proceeding according to Senator Hart. In this vein if such interference existed then under Section 5 U.S.C. 552 (a)(4)(B) it was incumbent on the Board to sustain its burden of proof. This it did not do because it could not, there being no interference.

The statements in the case at hand were requested only seven (7) days before the hearing, a time when the Board had completed its investigation. The request was limited to only those statements of witnesses the Board would call, thus having no effect on those whose statements would remain confidential. The requested statements would be disclosed only a few days later at the hearing under the Board's own rules (29 C.F.R. 102.118 (b)(1) — see Resp. App. A). These witnesses according to Board procedures had even previously been told their statements would be disclosed later at a hearing. Thus the possibility of subsequent disclosure did not adversely affect the giving of the statement.

There is no evidence Respondent has ever been found guilty of an unfair labor practice charge[17] or had threatened or taken any action against any person because he or she gave the Board a statement or co-operated with the Board in any manner. Furthermore there is nò evidence Respondent had made any threats or taken any action to interfere with the enforcement proceeding. The Board's position would have the effect of pre-judging Respondent guilty of illegal activities. This is contrary to our system of presumed innocence.

In fact while the Board cries "wolf," the facts show the Board has little to worry about. The Board's own 1977 Annual Report (42nd annual report for the fiscal year ended September 30, 1977, G.P.O. 1977) at Table 2 on page 221 shows that for fiscal 1977 only 3.1% of the unfair charges against employers concerned 8(a)(4) allegations. The handling of an 8(a)(4) charge is not even considered an "expedited" or "priority" case as with allegations concerning other sections of the NLRA.[18] If employees were in fact coerced, retaliated against, interefered with, etc. for giving statements or testifying then the Board's satistics would be entirely different. However, such interference is not a reality and thus there was no proof.

Further evidence that the Board's presumption herein is unwarranted is found in the Board's admissions in its own Memorandum 78-4 issued by its

[17] Section 8(a)(4) states it is an unfair labor practice for an employer "to discharge or otherwise discriminate against any employee because he has filed charges or given testimony under the Act;" (29 U.S.C. 158(a)(4)).

[18] See 29 C.F.R. 101.4.

General Counsel January 27 of this year. That Memorandum is reproduced in Resp. App. B and admits with regard to back pay cases the Board's previous guidelines on disclosure "may be more restrictive than necessary and broader disclosure of these cases would be beneficial to the resolution of back pay disputes." The Board therein changed its back pay disclosure regulations to provide for disclosure of witness statements. The revised regulations also provide for the factual/deliberative distinction discussed *infra.* regarding the Board's exemption 5 claim. Also with regard to the exemption 5 work-product argument discussed *infra* the Board seems to focus on the "mental impressions, conclusions, opinions or legal theories of an attorney or other party concerning the litigation" as opposed to the factual elements of work-product.

The case at hand is not the first time the Board has *presumed* interference with enforcement proceedings. In *Getman v. NLRB*, 450 F.2d 670 (C.A. D.C., 1971), involving an FOIA action to obtain copies of voting lists, the Board withheld the lists claiming exemption 7.[19] The Board claimed there would be interference with its election procedures. The Circuit Court, ordering disclosure, said:

[19] "This court makes no effort to conceal its disapproval of the NLRB's apparent policy of restricting discovery in all proceedings to the bare legal minimum regardless of the circumstances of the case. It is this frustrating and in some cases unjust policy which has led to a rash of FOI Act suits against the NLRB and has compelled that agency to acquire the great familiarity with the FOI Act that it obviously possesses."

Deering Milliken, Inc. v. Nash, 90LRRM at 3149 (1975)

Interference with the "laboratory conditions" required to conduct these elections may in deed result in elections being set aside, as the Board contends. But there is no proof to support the contention. It will be time enough to consider the relief to which the Board is entitled if and when a showing of disruption of Board functions is made.

We agree with appellees that it is ironic that the Board should attempt to use speculation about added delays in the prompt resolution of questions of representation as a basis for preventing this study. One of the primary goals of the study is to consider the feasibility of changing Board rules to eliminate unnecessary grounds for challenges to elections, so as to streamline the entire process. Thus the Board is taking a too shortsighted view of its own self interest. Moreover, the Board's position suffers from the obvious self-justifying tendency of an institution which in over 30 years has itself never engaged in the kind of much needed systematic empirical effort to determine the dynamics of an election campaign or the type of conduct which actually has a coercive impact. The public interest need for such an empirical investigation into the assumptions underlying the Board's regulation of campaign tactics has for some time been recognized by labor law scholars.

(*Id.*, pp. 675, 676)

The Board also had applied to Justice Black of this Court for a stay of the District Court's order. Justice Black, in denying the requested stay, said:

> The Government applies for a stay on the

> ground that the district court order requiring the Board to comply with the Freedom of Information Act and deliver the records in question to respondents would interfere with the representation election procedures under the National Labor Relations Act, 49 Stat 449, as amended. The Board was created by Congress and Congress has seen fit to make identifiable records of the Board and other government agencies available to any person upon proper request. I find no exception in the Freedom of Information Act which would authorize the Board to refuse promptly to turn over the requested records. I deny the application for stay without prejudice to the Government to present its application to another Member of this Court
>
> (404 U.S. 1204, 1205 (1971))

Following disclosure of the requested information under the FOIA, Professors Getman, Goldberg and Herman conducted an empirical study to determine the validity of the Board's longstanding assumptions of interference in the election process. The results of their study are published in *Union Representation Elections: Law and Reality* (Russell Sage Foundation, New York, 1976; Library of Congress Catalog Number: 76-13271). In the Foreward, Harvard University President Derek C. Bok wrote:

* * *

> Unlike many empirical studies, their work arrives at clearcut conclusions that make a massive attack on the assumptions that support an entire body of regulatory law.
>
> * * *
>
> Ironically, one must recognize at the outset

that the Board is singularly ill-equipped to evaluate the study. Neither the members of the Board nor its staff are social scientists, and the research unit established in the early years of the NLRB was long ago dismantled by Congress as a result of repeated charges that it was infested by persons of Communist persuasion. The shortsightedness of Congress is sharply revealed by this book, for the study carried out by Getman, Goldberg, and Herman is precisely the type of work that the Board ideally should have conducted decades ago to make certain that its rules were truly based on the best available data. As it is, the present study must be received by a Board that is poorly prepared to evaluate its findings and ill-disposed at this late date to accept a body of conclusions that calls in question a whole multitude of rules that have been in force for many years.

In the study itself, Professors Getman, Goldberg and Herman conclude:

> Board regulation traditionally has been defended by reference to the Board's expert ability to determine which campaign tactics are likely to interfere with employee freedom of choice. The Board has claimed such expertise, and the courts have generally acquiesced in this claim. In recent years, however, courts and commentators have begun to challenge the assumption of Board expertise, pointing out that the source of the Board's presumed special knowledge has never been identified. Judge Skelly Wright described the Board as "an institution which in over thirty years has itself never engaged in the kind of much needed systematic empirical effort to determine the dynamics of an election campaign or the type of conduct which actually has a coercive impact." Indeed, the Board has not permitted the introduction of evidence as to whether particular conduct had a harmful impact on employees involved in a given election.
>
> > "In evaluating the interference resulting from specific conduct, the Board does not attempt to assess its actual effect on employees, but rather concerns itself with whether it is reasonable to conclude that the conduct tended to prevent the free formation and expression of the employees' choice."
>
> The Board's rules concerning the circumstances under which it will find a tendency to coerce employee choice are thus not grounded on factual data, but on guesses or assumptions. However, nothing in the collective activities or experience of the Board insures the accuracy of these assumptions. To be sure, many of the Board's members and staff have spent years interpreting and applying Board rules in terms of the policies, language, and legislative history of the NLRA. But the process of elaborating and harmonizing rules of decision provides no information about the validity of the assumptions underlying those rules.
>
> Some Board members and staff have served as lawyers for employers or unions involved in organizing campaigns, while others have been attorneys in NLRB regional offices, engaged in investigating objections and unfair labor prac-

tice charges. Many of these people have observed that a particular employer campaign tactic was followed on one or more occasions by a union loss. Therefore, they may have assumed that the union loss was due to this tactic. There are two possible flaws in this assumption. Initially, the observations on which it is based may not be representative. The same tactic may be followed just as frequently by a union victory. Alternatively, the union loss may have been caused by factors other than the tactic that impressed the observer.

The Board has no means of determining the actual effect of the tactics used in union representation elections. Prior archival and field studies, though limited in scope, have indicated the potential value of empirical research in resolving this question. Our study was designed to provide the broadly based empirical data necessary to evaluate the effectiveness of campaign tactics used in union representation elections and the propriety of the Board's regulation of those tactics.

* * *

THE BOARD'S ASSUMPTIONS

The Board rarely articulates its assumptions. Frequently, when it sustains objections to an election, it asserts only that the "totality" of the conduct alleged to be unlawful was such as to interfere with free choice. In such cases it is difficult to determine precisely which conduct was objectionable, let alone why. Moreover, the Board is not consistent. The same assumption is given different weight in different cases, and, at

times, one assumption is discarded in favor of its opposite.

(*Id.*, pp. 4-7; footnotes omitted)

Following publication of the professors' study the Board reversed in *Shopping Kart Food Market and Retail Clerks, Local 99, AFL-CIO*, 228 NLRB No. 190, 94 LRRM 1705 (1977), its long standing "presumption" of election interference enunciated in the Board's 1962 *Hollywood Ceramics Company, Inc.* decision, 140 NLRB 221, 51 LRRM 1600 (1962). The Board cited the professors' study as well as other court decisions and studies. The Board thus again admitted another[20] of its "presumptions" was contrary to empirical, provable facts.

The Fifth Circuit in the case *sub judice* did not subscribe to the Board's unproven presumption and inference that disclosure "would interfere with enforcement proceedings." The Fifth Circuit does not stand alone in rejecting this *per se* agency approach. In *Hospital Authority v. Perry*, —F.2d —, 16 FEP 68 (C.A. 4; January 26, 1978), the Equal Employment Opportunity Commission (EEOC), an agency also concerned with the employer-employee relationship and with prohibited employment discrimination, refused to disclose statements obtained by the EEOC during an investigation of charges. The EEOC's refusal was based in part on exemptions 5 and 7(A). In the *de novo* District Court hearing, the Court, based on its *in camera* examination of the requested statements, ordered the EEOC to disclose some of the re-

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[20] See discussion *supra* concerning Board's Memorandum 78-4 (Resp. App. B).

quested statements. The Fourth Circuit affirmed,[21] stating:

> [1974 AMENDMENTS]
>
> The circumstances prompting the 1974 Amendments make clear their purpose. Congress was unquestionably dissatisfied with the broad application given exemption 7 of the original Act by the courts and with the niggardly way in which the courts were allowing disclosure of investigatory files. Despite the fact that the FOIA was designed to encourage disclosure, the courts had given an expansive interpretation of a number of the exemptions in the Act, including particularly exemption 7, under which statements procured in the course of the open investigation by an agency were *per se* nondisclosable, irrespective of the equities of the situation. Among the cases instanced in this regard is our own Wellman Industries, Inc. v. NLRB (4th Cir. 1974) 490 F.2d 427, 429-430, 82 LRRM 2857.
>
> To correct this application of exemption 7 by the courts, the Congress in 1974 amended exemption 7 by providing that such exemption protected investigatory records from disclosure "only to the extent that the production of such records would (A) interfere with enforcement proceedings * * *" or "(D) disclose the identity of a confidential source * * *." In order that the courts in applying such exemption might be provided with an adequate factual basis for determining

[21] The EEOC has not petitioned for certiorari but has disclosed the statements as ordered.

> whether disclosure would "interfere with enforcement proceedings," or disclose a "confidential source," Congress by the same Amendments gave the courts the right to make *in camera* inspections of all requested documents prior to ruling on disclosure under exemption 7.
>
> It is manifest from this legislative history of the 1974 Amendments that Congress intended to proscribe the use of a mechanical test such as that enunciated in Title Guarantee in favor of "a case-by-case" factual inquiry in determining whether to require disclosure of investigatory records. Specifically, as has been aptly observed, there was in the legislative history nothing to support "the reliance * * * on the distinction between open and closed investigatory files." Rather, the legislative record demonstrates, as the same commentator adds, that the "only factor" to be considered in connection with the disclosure of investigatory records, whether of an open or a closed investigation, "was whether the files would interfere with enforcement proceedings if released," or disclose a "confidential source;" and the author is unquestionably right in declaring that the rule adopted in Title Guarantee and followed in other cases "conflicts with the purpose of the 1974 Amendments" and, if followed, "precludes the effective use of the *in camera* inspections which are expressly permitted by the 1974 Amendments."
>
> In our opinion, the district court conformed in its decision to the procedure established by the 1974 Amendments. It examined *in camera* the

affidavits obtained by the EEOC from the charging parties. Based on that *in camera* inspection, it concluded that the statements procured from all present employees of the Hospital should not be disclosed because such disclosure might interfere with the EEOC investigation but that the disclosure of the statements procured from former employees would not interfere or disclose confidential sources. It accordingly denied the disclosure of the statements of present employees and ordered the disclosure of those of former employees. In our opinion the court did not abuse its discretion in the selection of the records to be disclosed. See Columbia Packing Co., Inc. v. U. S. Dept. of Agri. *supra*, 563 F.2d at 500.

[2] We find no error in the order for disclosure of the statements of former employees or to the court's finding that such disclosure would not interfere with the EEOC investigation. That finding was based on an *in camera* examination of the affidavits themselves. The EEOC does not argue that the district court's finding, after such review, that disclosure would not have a chilling effect on present employees or would not interfere with the investigation is erroneous; it contends rather for a strict *per se* rule of nondisclosure, which the 1974 Amendments clearly proscribed and for which there is, in our opinion, no warrant. Indeed, the grant of a right to *in camera* review can only relate to open investigation, since obviously there can be no interference arising out of disclosure if the investigation is closed.

(*Id.*, 16 FEP at 685, 686 (1978); footnotes omitted)

The Fourth Circuit did not buy the *per se* approach as did *Title Guarantee*[22] and those circuits which have fallen in step[23]

The Second Circuit admitted in *Title Guarantee* (*Id.*, p. 492) it "was impressed with the appellee's grasp of the FOIA amendments and almost persuaded by its argumentation and that of the district court . . .".[24] The Second Circuit focused on the Board's internal disclosure rules and found Congress did not intend to change those rules by the FOIA (*Id.*, p. 492). The Second Circuit missed the point that FOIA was not intended to replace any particular discovery rules[25] applicable between the agency and parties with whom it deals. The 1974 amended FOIA set up a separate standard for all agencies on disclosure to the public. *Title Guarantee's* approach penalizes the requesting party if the party happens to be in litigation with the

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[22] *Title Guarantee Co. v. N.L.R.B.* 534 F.2d 484 (1976).

[23] E.g., *Goodfriend Western Corp. v. Fuchs*, 535 F.2d 145 (C.A. 1), certiorari denied, 429 U.S. 895; *Roger J. Au & Son, Inc. v. N.L.R.B.* 538 F.2d 80 (C.A. 3); *N.L.R.B. v. Hardeman Garment Corp.*, 577 F.2d 559 (C.A. 6); *Abrahamson Chrysler-Plymouth, Inc. v. N.L.R.B.*, 561 F.2d 63 (C.A. 7); *Harvey's Wagon Wheel, Inc. v. N.L.R.B.*, 550 F.2d 1139 (C.A. 9); *Climax Molybdenum Co. v. N.L.R.B.*, 539 F.2d 63 C.A. 10); *New England Medical Center Hosp. v. N.L.R.B.*, 548 F.2d 377 (C.A. 1).

[24] The District Court's opinion (407 F. Supp. 498) was an extremely well researched and reasoned opinion.

[25] "It is sufficient for us to hold that Rule 26(b) does not authorize an agency to withhold any records which the [FOIA] commands it to disclose", *Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Balt.*, 508 F.2d 945 at 950 (C.A. 4, 1975)

agency.[26] This is contrary to this Court's finding in *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, at fn. 10 where this Court stated "Sears' rights under the Act are neither increased nor decreased by reason of the fact that it claims an interest in the Advice and Appeals Memoranda greater than that shared by the average member of the public."

The Second Circuit's *Title Guarantee* decision is also inconsistent with the liberal disclosure requirements of the amended FOIA. This Court in *Sears* stated:

> The Act's background and its principal objectives are described in EPA v. Mink, 410 U.S. 74, 79-80 (1973), and will not be repeated here. It is sufficient to note for present purposes that the Act seeks "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965) (hereinafter S. Rep. No. 813); EPA v. Mink, supra, at 80. As the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions.
>
> (*Sears*, 421 U.S. at 136)

The Second Circuit in *Title Guarantee* held that "Absent a clearer indication of contrary congressional in-

[26] The Board's March 2, 1978 Report to the Senate and the House, required under 5 U.S.C. 552(d) at page 7 therein states ". . . 652 of the 1518 recorded requests were from parties to a proceeding . . .".

tent, we are not prepared to hold that disclosure may be required under the FOIA in connection with an ongoing unfair labor practice enforcement proceeding" (534 F.2d at 491). A review of the legislative history of the 1974 FOIA amendments makes clear Congress was fed up with restrictive, categorical non-disclosure. This was precisely the point. Even if "congressional intent" was not altogether "clear" to the Second Circuit the legislative history and the decisions of this and other courts resolve any doubt in favor of disclosure.

This Court in *Department of the Air Force v. Rose*, 425 U.S. at 365, 366, quoted with approval from *Vaughn v. Rosen*, 523 F.2d at 142:

> Reinforcing this interpretation is "the clear legislative intent [of the FOIA] to assure public access to all governmental records whose disclosure would not *significantly harm* specific governmental interests." [Soucie v. David, 145 US App DC 144, 157, 448 F2d 1067, 1080 (1971)]. As a result, we have repeatedly stated that "[t]he policy of the Act requires that the disclosure requirements be construed broadly, the exemptions narrowly." [Ibid., Vaughn v. Rosen, 157 US App DC 340, 343, 484 F2d 820, 823 (1973).] Thus, faced with a conflict in the legislative history, the recognized principal purpose of the FOIA requires us to choose that interpretation most favoring disclosure. (emphasis added)

Congress' intent should have been clear to the Second Circuit and its progeny. During the May 30, 1974 Senate discussions Senator Kennedy stated:

When Congress passed the Freedom of Information Act, it issued a rule of Government that all information with some valid exceptions was to be made available to the American people — no questions asked. The exceptions — intended to safeguard vital Defense and State secrets, personal privacy, trade secrets, and the like — were only permissive, not mandatory. When in doubt, the department or agency was supposed to lean toward disclosure, not withholding.

But most of the Federal bureaucracy already set in its ways never got the message. They forgot they are the servants of the people — the people are not their servants.

> Agency officials appeared and actually testified under oath that they had to balance the Government's rights against the people's rights. The Government, however, has no rights. It has only limited power delegated to it from we, the people.
>
> (Source Book, pp. 286, 287)

Representative Erlenborn (Illinois) in the March 14, 1974 debate and vote remarked:

> In addition, H.R. 12471 mandates that the Government respond quickly to complaints filed under this act and, at the discretion of courts, pay attorney fees and other litigation costs incurred by victorious plaintiffs. The measure also establishes that agencies shall report annually to the Congress on their performance under the act. All these provisions are designed to stimulate agencies to comply more completely and promptly with the

> law, and on close questions, to decide in favor of disclosure of information to the public.
>
> (Source Book, p. 245)

The *Title Guarantee* approach, like that of the Board herein,[27] is anachronistic. The Board would have this Court approach exemption 7 as if Congress had not overriden the Presidential veto. Attorney General Levi in his Memorandum on the 1974 Amendments to the Freedom of Information Act (February, 1975) wrote with regard to the changes in exemption 7:

> The 1974 Amendments to the Freedom of Information Act *substantially* altered the exemption concerning investigatory material compiled for law enforcement purposes.
>
> (Source Book, pp. 514, 515, emphasis added)

In his earlier December 11, 1974 "Preliminary Guidance" Memorandum, the Attorney General also referred to the amendments to exemption 7 as "substantive" (Source Book, p. 553). Senator Hruska in the May 30, 1974 debate on the amendments termed such as "major, substantive changes" (Source Book, p. 363).

The pre-amendment arguments the Board advances are that prehearing disclosure of these "typical" statements would interfere or harm enforcement proceedings. Of course the Board's own Memorandum 78-4 (Resp. App. B) shows the Board's presumptions

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[27] Senator Ervin's reminiscence of a young lawyer's comment on non-disclosure in a lawsuit is indicative of Congress' intent for agencies to quit withholding information. (Source Book, p. 461)

are without foundation. Respondent has already cooperated with the Board, furnishing documents, witness statements, etc. setting forth its position and evidence. There is no danger of frustrated proceedings or constructed defenses. As the *Getman* study shows Board concern about fears of employees is not founded in fact. The Board even admits it advises witnesses their statements may later be disclosed to their employer.

Quite to the contrary of the Board's argument, disclosure of witness statements would encourage settlement and thus even improve the Board's settlement percentage cited in footnote 4, p. 17 of its brief. The Board obviously recognizes this on pages 19 and 20 of its brief when it admits its agents are directed to "openly discuss" the nature of the evidence on specific violations when pursuing a likely settlement.

The FOIA was amended in 1974 but the Board will not concede the amended Act requires any more disclosure. However, the Sixth Circuit notes in *Hawkes v. Internal Revenue Service*, 507 F.2d 481, 485 (C.A. 6, 1974) "that Congress has recently passed amendments to the Act which have further broadened the scope of disclosure." While not ruling specifically on the Board's exemption 7 argument, this Court in *Sears*, *supra*, noted its disapproval of the Board's *per se* approach by stating:

> The legislative history clearly indicates that Congress disapproves of those cases, relied on by the General Counsel, see p. 28, supra, which relieve the Government of the obligation to show that disclosure of a particular investigatory file would

> contravene the purposes of Exemption 7. S Conf Rep No. 93-1200, (1974). The language of the amended Exemption 7 and the legislative history underlying it clearly reveal a congressional intent to limit application of Exemption 7 to agency records so that it would apply only to the extent that "the production of such records would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, constitute [an] . . . unwarranted invasion of personal privacy, disclose the identity of an informer, or disclose investigative techniques and procedures".
>
> (*Sears*, 421 U.S. 164, 165)

This Court also noted:

> Since the General Counsel failed in the District Court to assert a claim under the *version of Exemption 7 which was, if anything, more favorable to his position than the current version*, the Court of Appeals on remand should determine whether petitioners are foreclosed from further pursuing the issue. We note in addition, however, that a court of equity may always amend its decree on a proper showing, and the District Court may wish to do so, if the General Counsel demonstrates an injury to his functions of the type sought to be prevented in Exemption 7, resulting from the disclosure of a *particular* Advice or Appeals Memorandum.
>
> (*Id.*, 165; emphasis added)

In sum the Board has not carried its statutory burden of proof that disclosure of the requested statements would interfere with the enforcement proceed-

ing. The Board does not have the benefit of any presumptions in the *de novo* court hearing. The amended FOIA clearly requires disclosure of all or even parts of requested investigatory records unless the Board's evidence is sufficient to carry its burden of proof regarding the particular documents or parts thereof. Here the Board offered no proof of any sort and it is not therefore entitled to withhold under exemption 7(A).

II. THE BOARD HAS NOT PROVED THE REQUESTED INFORMATION IS ANYTHING OTHER THAN FACTUAL INFORMATION, NOT WITHIN THE FOIA EXEMPTION 5 FOR DELIBERATIVE AND POLICY MATTERS.

The requested statements may not be withheld unless the Board proves they are:

> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.
>
> (5 U.S.C. § 552(b)(5))

At the District Court hearing, the Board, as the District Court found, made no claim that the written statements were "memorandums" or "letters." Neither did the Board assert that the requested statements possessed a deliberative, as opposed to a factual quality (A. 63). The statements are nothing more than witness' recollections of factual situations (A. 91). Under 552 U.S.C. (a)(4)(B) the Board has the statutory burden of proving the requested information was an "inter-agency or intra-agency memorandum

or letter." The Board however offered no proof whatsoever at the hearing and thus is not entitled to withhold under exemption 5.

In *Poss v. NLRB*, 565 F.2d 654 (C.A. 10, 1977) which has fallen in step with the early *Title Guarantee* decision, the Tenth Circuit on a FOIA request concerning witness statements found exemption 5 "clearly inapplicable." The Circuit Court stated at p. 659:

> Exemption (5)
>
> [5] This exemption concerns inter-agency or intra-agency memorandum or letters. Such is clearly inapplicable to the present case. We are here concerned with notes taken by a Board investigator during an interview, and, in certain instances, affidavits given by the person interviewed. Such do not constitute inter-agency or intra-agencies memorandum or letters. Nor would such notes or affidavits be deemed as the work product of an attorney. See, for example, N.L.R.B. v. Sears, Roebuck § Co., 421 U.S. 132, at pp. 154, 155, 95 S. Ct. 1504, for a discussior of this matter.

The Board has not petitioned for certiorari in the *Poss* case (Pet. Br., p. 33, fn. 17).

A. FACTUAL INFORMATION MAY NOT BE WITHHELD UNDER EXEMPTION 5 OF THE FOIA.

In the *N.L.R.B. v. Sears* case, 421 U.S. 132 (1975), this Court citing *Environmental Protection Agency v. Mink*, 410 U. S. 73 at 87-93 (1973), noted

that *factual* documents were probably *not* entitled to exemption 5 treatment. (*Sears*, p. 161, fn. 27)

In *Mink*, *supra*, at page 89, this Court said:

> Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires a different treatment for materials reflecting deliberative or policymaking processes on the one hand, and *purely factual, investigative matters* on the other. Nothing in the legislative history of Exemption 5 is contrary to such a construction. (Emphasis added)

In *Soucie v. David*, the D.C. Court of Appeals found:

> That exemption [(b)(5)] was intended to encourage the free exchange of ideas during the process of deliberation and policymaking, accordingly, it has been held to protect internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes, *but not purely factual or investigatory reports.* Factual information may be protected only if it is inextricably intertwined with policymaking processes . . . But courts must beware of a government litigant to give [this exemption] an expansive interpretation in relation to the particular records in issue.
>
> (*Id.*, 448 F.2d 1067 at 1077, 1078 (1971); footnotes omitted; emphasis added)

See also *Stokes v. Brennan*, 476, F.2d 699 at 703, 704 (C.A. 5, 1973).

There is no evidence that the requested statements contain anything but purely factual information and thus are not entitled to exemption 5 treatment accorded to deliberative materials. The purpose of exemption 5 was not to shield "primary information, such as verbatim witness testimony or objective data"[28] but to protect the "papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be."[29] The requested statements are thus not exempt under 5 U.S.C. 552(b)(5) and must be disclosed.

B. THE BOARD'S EXEMPTION 5 CLAIM, INCLUDING THE "WORK-PRODUCT" ARGUMENT, HAS NOT BEEN ACCEPTED BY THE COURTS

Exemption 5 has been one of the Board's makeweight arguments in many of its refusals to disclose requested statements. It has inconsistently defended withholding of such statements on an exemption 5 basis and the included "work-product" aspect of exemption 5. Even its benchmark *Title Guarantee* case, *supra*, did not back[30] its exemption 5 defense which included the "work-product" argument. The Tenth Circuit's *Poss* decision, *supra*, squarely rejected this contention.

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[28] *Kent Corp. v. NLRB*, 530 F.2d 612 at 624 (C.A. 5, 1976).

[29] *Sears*, *supra*, p. 153.

[30] The Circuit Court found it unnecessary to rule on exemption 5 but it cited the lower court's decision and the many other cases rejecting the exemption 5 claim (534 F.2d 484 at 492, fn. 15).

In *Deering Milliken, Inc. v. Irving*, 548 F.2d 1131 (1977), the Fourth Circuit also considered the same exemption 5 arguments the Board now makes. In rejecting the Board's contention the Fourth Circuit stated:

> IV
>
> The General Counsel also invokes 5 U.S.C. § 552(b)(5) which exempts from disclosure "intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency."
>
> * * *
>
> [10] The Supreme Court has construed exemption 5 as permitting an agency to withhold documents which are privileged and, therefore, normally not available in pre-trial discovery to a person engaged in litigation with the agency. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148-55, 95 S. Ct. 1504, 44 L.Ed.2d 29 (1975). In stating this rule, the Court noted that the particular needs of a specific litigant do not affect the agency's obligation to disclose. Consequently, only those memoranda which would not "routinely be disclosed" in private litigation are exempt. Sears, 421 U.S. at 149 n. 16, 95 S. Ct. 1504; H.R. Rep. No. 1497 at 10, reprinted in Senate Judiciary Committee, 93d Cong. 2d Sess., Freedom of Information Act, at 22.
>
> The General Counsel claims that the requested documents would not be discoverable, and thus are exempt from disclosure under § 552(b)(5) on the following grounds: (a) attorney's work-product privilege, (b) executive privilege,

> and (c) the limitations upon discovery of experts' reports.
>
> [11] Without defining the "outer boundaries of the attorney's work-product rule," the Court observed that exemption 5 "clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy." Sears, 421 U.S. at 154, 95 S. Ct. at 1518. Without doubt, it also applies to the "mental impressions, conclusions, opinions, or legal theories" of the General Counsel's attorneys and other representatives. See Federal Rule of Civil Procedure 26(b)(3).
>
> The Court has set forth the parameters of executive privilege under exemption 5 more completely than those of the work-product privilege. In EPA v. Mink, 410 U.S. 73, 93 S. Ct. 827, 35 L.Ed.2d 119 (1973), the Court held that the doctrine of executive privilege entitles an agency to withhold from disclosure "intra-agency advisory opinions," and other information reflecting "deliberative or policy making processes." 410 U.S. at 86-89, 93 S. Ct. 827. The Court, however, observed that the executive privilege has "finite limits, even in civil litigation." Accordingly, it held that "in the absence of a claim that disclosure would jeopardize state secrets, . . . memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private

parties in litigation with the Government," Mink, 410 U.S. at 88, 93 S. Ct. at 836.

The General Counsel argues that the work-product privilege is not limited by the factual-deliberative distinction set forth in Mink; instead, this privilege embraces all factual material assembled for trial by a litigant's attorney or other representative.

[12] We cannot accept the General Counsel's interpretation of exemption 5. To allow such a broad exemption under the work-product rule would frequently swallow the distinction between factual and deliberative matters so carefully delineated by the Court in Mink. The General Counsel's argument would lead to the anomalous result of withholding factual material despite the Supreme Court's recognition that the same material would not be withheld under executive privilege because it "would generally be available for discovery by private parties in litigation with the Government." Mink, 410 U.S. at 88, 93 S. Ct. at 836. Therefore, we view the factual-deliberative distinction emphasized in Mink relevant to a consideration of the work-product privilege.

(*Id.*, pp. 1137, 1138, footnotes omitted)

For instance see: *Hospital Authority v. Perry (EE OC)*, — F.2d —, 16 F.E.P. 68 at fn. 5 (C.A. 4, Jan. 26, 1978); *Goodfriend Western Corp. v. Fuchs*, — F. Supp. —, 92 LRRM 2461, (Mass., 1976) rev. on other grounds; *Climax Molybdenum Co. v. NLRB*, 407 F. Supp. 208 (Colorado; 1975) affirm. on other grounds.

Not only have the courts rejected the Board's exemption 5 argument with its work-product facet, but often the Board has itself not even raised the exemption 5 claim.[31] See *Au & Son, Inc. v. NLRB*, 405 F. Supp. 1200 (W.D. Pa., 1976) affirmed on other grounds; *Wellman Industries, Inc. v. NLRB*, 490 F.2d 427 (C.A. 4, 1974), cert. denied, 416 U.S. 993; *NLRB v. Hardeman Garment Corp.*, 406 F. Supp. 510 (W.D. Tenn, 1975), rev. on other grounds; *Abrahamson Chrysler-Plymouth, Inc. v. NLRB*, 561 F.2d 63 (C.A. 7, 1977); *Harvey's Wagon Wheel, Inc. v. NLRB*, 550 F.2d 1139 (C.A. 9, 1976); *Proctor & Gamble v. NLRB*, — F. Supp. —, 97 LRRM 2904 (N.D. Texas, Feb. 10, 1978).

In *Guidelines of NLRB General Counsel for Regional Processing of Requests Under Freedom of Information Act*, dated July 8, 1975,[32] the Board's General Counsel spoke of the advice and appeals memoranda discussed in *Sears*, *supra*, and further stated:

> "Other material which would come within exemption 5 as defined by *Sears* would include final investigation reports, legal research memoranda prepared by Board agents during the investigation of a case. Board agents' case notes and memoranda to the file or to supervisors, requests for advice, Regional Office comments on appeal, drafts of decisions and directions of elections or decisions and orders, recommendations for ap-

[31] The Board's March 2, 1978 FOIA Report to the House and Senate, *supra*, p. 2, shows exemption 5 was not claimed in 53 instances where exemption 7(A) was claimed.

[32] Reprinted in *White Collar Report* (Bureau of National Affairs, Inc.), No. 957, August 8, 1975, at pp. C-1 and C-7.

proval of election agreements, and recommendations to issue notice of hearing.

* * *

This is not intended as an exhaustive list. There may well be *other memoranda or letters reflecting the frank discussion necessary to the deliberative process which exception 5 protects.* (Emphasis added)

Notably absent from this specific list of documents is the Board's investigative affidavit. Furthermore, in his Appendix of "Responses to FOIA Requests," General Counsel does not recommend invoking exemption 5 when a request for witness statements is received; he recommends refusing the request *only* on the bases of exemptions 7(A), (C) and (D). *Id.* at C-11 ("Table of Contents"), C-14 (#7A-3) and C-16 (#7C-3, #7D-3).

In its brief, p. 46, fn. 26, the Board refers to the facts in *Hickman v. Taylor*, 329 U.S. 495 (1947). The *Hickman* case is different from the instant case as statements were sought concerning persons whose identities were known to the requesting party. Also the testimony of these persons was available as these persons had already given public testimony which had been recorded and was available to the requesting party. The requested information there also contained the mental impressions of the attorney. However, in the instant case Respondent has no knowledge of which persons[33] gave written statements to the Board or who

[33] Only the Board knows which if any of these persons are Respondent's employees (A. 108, fn. 3).

will be called to testify; so it has no way to gather the information contained in these statements. The strictures placed by the Board (i.e., see *Johnny's Poultry*, 146 NLRB 770 (1964)) on interviewing employees prevent an employer from gathering information from an unwilling employee. Furthermore, the requested statements are merely factual accounts of witnesses and do not contain a Board attorney's mental impressions.

As this Court said in *Sears, supra*, at p. 154:

> Whatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation *which set forth the attorney's theory of the case and his litigation strategy.* (Emphasis added)

In sum, all facets of exemption 5 — the executive privilege, attorney work-product, etc. — have been interpreted in a way consistent with the factual/deliberative distinction. This approach is consistent with the legislative intent to protect the agency's decision making process yet construing exemption 5 very narrowly to allow maximum disclosure. The Board has not proven the requested information is anything but factual information. It cannot be withheld under exemption 5.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

WILLIAM M. EARNEST
ELARBEE, CLARK & PAUL
800 Peachtree-Cain Tower
Atlanta, Georgia 30303

CHARLES A. POELLNITZ
POELLNITZ, COX, ROBISON,
McBURNEY & JONES
Post Office Box 876
Florence, Alabama 35630

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APPENDIX A

APPENDIX A

The National Labor Relations Board ("NLRB" or "Board") has promulgated internal regulations regarding release of information in its possession. Relevant excerpts from the NLRB's Rules and Regulations, Series 8, as amended, 29 C.F.R. §§ 102, *et seq.*

SUBPART K — RECORDS AND INFORMATION

Freedom of Information Regulations

Sec. 102.117 Board materials and formal documents available for public inspection and copying; requests for identifiable records; files and records not subject to inspection; fees for copying and production; access to and amendments of records pertaining to individuals in systems of records.

(a)(1) The following materials are available to the public for inspection and copying during normal business hours: (i) All final opinions and orders made in the adjudication of cases; (ii) administrative staff manuals and instructions that affect any member of the public (excepting those establishing internal operating rules, guidelines, and procedures for the investigation, trial, and settlement of cases); (iii) a record of the final votes of each member of the Board in every agency proceeding; and (iv) a current index of final opinions and orders made in the adjudication of cases.

* * *

(d) Subject to the provisions of §§ 102.31

(c) and 102.66(c)[1], all files, documents, reports, memoranda, and records of the agency, falling within the exemptions specified in 5 U.S.C. section 552(b), shall not be made available for inspection or copying, unless specifically permitted by the Board, its chairman, or its general counsel.

* * *

Sec. 102.118 Board employees prohibited from producing files, records, etc., pursuant to subpoena ad testificandum or subpoena duces tecum; prohibited from testifying in regard thereto; production of witnesses' statements after direct testimony. —

(a) Except as provided in section 102.117 of these rules respecting requests cognizable under the Freedom of Information Act, no regional director, field examiner, administrative law judge, attorney, specially designated agent, general counsel, member of the board, or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or of the general counsel, whether in response to a subpoena duces tecum or otherwise, without the written consent of the Board or the chairman of the Board if the document is in Washington, D. C., and in control

[1] Section 102.31(c) provides the Board may, with the Attorney General's approval, order an individual to testify or provide other information in a Board proceeding if in the Board's opinion such is necessary in the public interest and if such individual invokes the privilege against self-incrimination. Section 102.66(c) sets forth the procedure for the issuance of Board subpenas.

of the Board; or of the general counsel if the document is in a regional office of the agency or is in Washington, D. C., and in the control of the general counsel. Nor shall any such person testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, territory, or the District of Columbia, or any subdivisions thereof, with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board or the general counsel, whether in answer to a subpena, or otherwise, without the written consent of the Board or the chairman of the Board if the person is in Washington, D.C., and subject to the supervision or control of the Board; or of the general counsel if the person is in a regional office of the agency or is in Washington, D. C., and subject to the supervision or control of the general counsel. A request that such consent be granted shall be in writing and shall identify the documents to be produced, or the person whose testimony is desired, the nature of the pending proceeding, and the purpose to be served by the production of the document or the testimony of the official. Whenever any subpoena ad testificandum or subpoena duces tecum, the purpose of which is to adduce testimony or require the production of records as described hereinabove, shall have been served on any such person or other officer or employee of the Board, he will, unless otherwise expressly directed by the Board or the chairman of the Board or the general counsel, as

the case may be, move pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or otherwise, to have such subpena invalidated on the ground that the evidence sought is privileged against disclosure by this rule.

(b)(1) Notwithstanding the prohibitions of subsection (a) of this section, after a witness called by the general counsel or by the charging party has testified in a hearing upon a complaint under section 10(c) of the act, the administrative law judge shall, upon motion of the respondent, order the production of any statement (as hereinafter defined) of such witness in the possession of the general counsel which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the administrative law judge shall order it to be delivered directly to the respondent for his examination and use for the purpose of cross-examination.

(2) If the general counsel claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the administrative law judge shall order the general counsel to deliver such statement for the inspection of the administrative law judge *in camera*. Upon such delivery the administrative law judge shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness except that he may, in his discretion, decline to excise portions which, al-

though not relating to the subject matter of the testimony of the witness, do relate to other matters raised by the pleadings. With such material excised the administrative law judge shall then direct delivery of such statement to the respondent for his use on cross-examination. If, pursuant to such procedure, any portion of such statement is withheld from the respondent and the respondent objects to such withholding, the entire text of such statement shall be preserved by the general counsel, and, in the event the respondent files exceptions with the Board based upon such withholding, shall be made available to the Board for the purpose of determining the correctness of the ruling of the administrative law judge. If the general counsel elects not to comply with an order of the administrative law judge directing delivery to the respondent of any such statement, or such portion thereof as the administrative law judge may direct, the administrative law judge shall strike from the record the testimony of the witness.

(c) The provisions of subsection (b) of this section shall also apply after any witness has testified in any postelection hearing pursuant to section 102.69(d) and any party has moved for the production of any statement (as hereinafter defined) of such witness in possession of any agent of the Board which relates to the subject matter as to which the witness has testified. The authority exercised by the administrative law judge under subsection (b) of this section shall be exercised by the hearing officer presiding.

(d) The term "statement" as used in subsections (b) and (c) of this section means: (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the party obligated to produce the statement and recorded contemporaneously with the making of such oral statement.

APPENDIX B

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OFFICE OF THE GENERAL COUNSEL
Division of Operations Management

MEMORANDUM 78-4 January 27, 1978

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Joseph E. DeSio, Associate General Counsel

SUBJECT: Disclosure of Factual Information in Backpay Proceedings

For some time we have been reexamining our policy with respect to disclosure of factual information to respondents in backpay cases.

We have concluded that our current guidelines in backpay cases may be more restrictive than necessary and that broader disclosure in these cases would be beneficial to the resolution of backpay disputes.

Accordingly, the Manual provisions set forth below which provide for fuller disclosure of factual information to respondents in backpay proceedings are effective immediately.

10663 *Disclosure of Factual Information Relevant to the Compilations.* It is the policy of the Board that, upon request made by the respondent after the issuance of the backpay specification, or of the notice of hearing without specification, factual information in documents obtained or

prepared by the Regional Office which is relevant to the computation of the net backpay, including search for employment or availability for employment, or other forms of reimbursement, shall be made available.

10663.1 *Scope of Disclosure.* The disclosure policy extends only to factual information contained in documents in the possession of the Regional Office. The standard of disclosure is all such information relevant to the computation of the net backpay or to other items of reimbursement or restitution. Under that standard disclosure should be made of the documents supporting such computations. All affidavits or other documents concerning discriminatee interim employment, search for employment or availability for employment should be made available for inspection and copying. As the disclosure policy pertains only to backpay or related computations, it does not require disclosure of information relating to other issues, such as successor employer, joint employer or *alter ego.*

10663.3 *Time and Form of Disclosure.* Disclosure prior to issuance of a notice of hearing with backpay specification, or of a notice of hearing without specification, is not required. Requests for disclosure prior thereto should be refused, unless the Regional Director determines that disclosure in advance of issuance of a notice of hearing of that information, which would be available to respondent upon request after issuance of a notice of hearing, will significantly enhance possibilities of settlement. The disclosure obliga-

tion will normally be satisfied by making the materials available for inspection and copying. It should be made clear to persons requesting the information that it is not routine public information, and that it is to be supplied only for use in the proceeding.

10663.2 *Materials Which Need Not be Disclosed.* Since the policy extends only to factual information relevant to the computation of net backpay, disclosure is not required to the extent documents contain information reflecting (1) deliberative or policy making processes of the Agency, (2) the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation, or other information which would not normally be available to a party in private litigation, (3) the identification of confidential sources of information to the Agency, or (4) intimate details of a personal nature having only slight relevance to the backpay inquiry.

If you have any questions concerning application or implementation, contact your Assistant General Counsel.

J.E.D.

Distribution:
Washington - Special
Regional - All Professionals

MEMORANDUM 78-4

APPENDIX C

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Excerpt from the November 2, 1977 Report of the Governmental Information and Individual Rights Subcommittee; Report 95-793, 95th Congress, 1st Session (G.P.O. 1977):

THE FREEDOM OF INFORMATION ACT

Legislative Background

In 1958 Congress enacted a law, introduced in the House by Congressman John Moss and in the Senate by Senator Thomas Hennings, to correct the abuse of the Government's 180-year-old "housekeeping" statute. The Moss-Hennings bill stated that the provisions of the 1789 statute, which permitted department heads to regulate the storage and use of government records, did not authorize withholding information or records from the public. This law produced some improvement with respect to the accessibility of Federal records, but the results were far from dramatic. Most agencies continued to operate in accordance with provisions of section 3 of the Administrative Procedure Act of 1946. This act was considered by many to encourage withholding rather than disclosure. Among other things, it authorized agencies to keep information secret "for good cause found", or where secrecy was in "the public interest", or where the information had a bearing on "any matter relating solely to the internal management of an agency". In addition, an agency was required to furnish information only to "persons properly and directly concerned".

It was not until 1966 that Congress enacted comprehensive legislation to deal with the problem of government secrecy. The Freedom of Information Act of 1966 was milestone legislation that reversed long-standing government information practices. Enacted as an amendment to section 3 of the Administrative Procedure Act, it replaced the vague and general language of that law, and made it clear that it was Congress' intent that "any person" should have access to identifiable records without having to demonstrate a need or even a reason. The burden of proof for withholding information, moreover, was placed on the government. The act also broadened the scope of information available to the public and provided judicial remedies for those wrongfully denied information.

Despite the substantial shift in emphasis brought about by the 1966 Act, some government agencies responded slowly and reluctantly to requests made under the law. In 1972 the House Foreign Operations and Government Information Subcommittee held 14 days of oversight hearings relating to the administration of the FOIA by Federal agencies and concluded that the "efficient operation of the Freedom of Information Act has been hindered by 5 years of foot-dragging by the Federal bureaucracy". As a result of its findings, the subcommittee proposed a number of procedural and substantive changes in the law. Two years later, Congress adopted amendments to the 1966 Act over the veto of President Ford. They became law in February 1975.

The 1974 amendments were designed to speed and ease the process of obtaining access to government files. Among other things, they required agencies to publish comprehensive indexes for the administrative processing of requests for information, required that agency fees for locating and copying records be uniform and moderate, and shortened the Government's time for answering complaints brought into court. They also prohibited agencies from withholding entire documents, only parts of which were exempt, by requiring the release of nonexempt portions. In addition, they directed the courts to expedite consideration of FOIA cases, authorized judges to examine withheld documents and make an independent determination as to whether they should be released, and provided for the recovery of attorney fees by requesters who prevailed in litigation.